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LAI CHENG OOI v. NASLEI ENTERPRISE SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[CIVIL CASE NO: BKI-24-87-10-2014]
5 MARCH 2015

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COMPANY LAW: *Receivership – Action against Official Receiver – Challenging decision of Official Receiver – Whether leave of court obtained under s. 226(3) Companies Act 1965 – Whether affairs of company administered by Official Receiver in his capacity as liquidator – Deceased major shareholder in company – Company*
C *purchased property before death of deceased – Whether deceased a bankrupt – Whether applicant executrix of deceased's estate – Whether Official Receiver could proceed with sale of property – Whether grant of probate gave absolute right to applicant to manage estate of deceased – Whether applicant a contributory of company – Whether applicant had locus standi to review decision of Official*
D *Receiver – Whether applicant could challenge decision of Official Receiver – Companies Act 1965, ss. 216(2), 226(3) & 279*

COMPANY LAW: *Receivership – Court appointed receivers – Action against – Leave of court – Failure to obtain – Whether to be struck out as defendant*

E ***COMPANY LAW:*** *Receivership – Official receiver – Action against – Leave of court – Whether action against company – Whether provision under s. 226(3) Companies Act 1965 complied*

SUCCESSION: *Executors – Powers of – Deceased major shareholder in company – Action against Official Receiver – Company purchased property before death of*
F *deceased – Whether deceased a bankrupt – Whether Official Receiver could proceed with sale of property – Whether estate of deceased vested in Director General of Insolvency (DGI) – Whether DGI contributory of company – Whether grant of probate conferred absolute right to executor to manage deceased's estate*

The applicant filed an application under s. 279 of the Companies Act 1965
G ('the Act') to challenge the decision of the second defendant, *ie*, the Official Receiver. The facts revealed that the applicant was the executrix and widow of one Lee Tain Tshung. The said Lee Tain Tshung held 60% of the shares in a company known as Tamparuli Granite Quarry (Sabah) Sdn Bhd (In Liquidation) ('the company'). On 10 May 1983, the company entered into
H a sale and purchase agreement with the first defendant, *ie*, Naslei Enterprise Sdn Bhd (Receivers Appointed), to purchase a property described as "1202 Waikiki Condominiums". The company paid RM304,000 as partial settlement of the purchase price. On 19 January 1989, the court appointed receivers to manage the first defendant. Lee Tain Tshung was adjudged a
I bankrupt on 23 November 2001 and remained as an undischarged bankrupt

when he died. The company was wound up on 18 October 2011 pursuant to a winding up petition filed by the Government of Malaysia for failure to pay tax. The issue in contention here was that the Official Receiver had informed the first defendant that the property could not be redeemed by proceeding with the sale and purchase agreement due to insufficient funds. As a result, the initial payment of RM207,000 was forfeited by the first defendant. The applicant, who claimed that she was an interested party in this suit, disputed that only RM207,000 was paid to the first defendant since construction materials had also been supplied to offset against the purchase price. *Vide* this application, the applicant sought for, *inter alia*, the following reliefs, *ie*, (i) a declaration that the purported termination of the sale and purchase agreement and the forfeiture of the part payment were null and void; (ii) a declaration that the sale and purchase agreement was still valid and subsisting; and (iii) a direction that the first defendant conclude the sale and purchase agreement through the Official Receiver. The defendants, however, raised several objections in relation to this application where it was contended that (a) the applicant did not have *locus standi* to file this application; and (b) the applicant did not obtain leave under the Act to commence this action against the defendants.

Held (dismissing application with costs):

(1) Section 216(2) of the Act read together with the provisions of the Bankruptcy Act 1967 deprives the applicant of any legal standing to complain about the manner in which the affairs of the company are being administered by the Official Receiver in his capacity as a liquidator. Section 8(1) of the Bankruptcy Act 1967 provides that upon bankruptcy, the estate of the bankrupt is vested in the Director General of Insolvency ('DGI'). On the facts, the entire estate of Lee Tain Tshung was vested in the DGI upon making of the adjudication and receiving order. By virtue of s. 216(2) of the Act, the DGI was the trustee of a contributory who has became bankrupt and could represent him for all purposes of the winding up. (paras 10, 13 & 14)

(2) The DGI had become the contributory of the company. The grant of probate did not give any right to the applicant to claim that she was a contributory of the company. Further, the property could not vest in the executor or administrator if it had passed by survivorship to some other person. Therefore, the grant of probate did not grant absolute right to the executor to manage the estate of the deceased. Even before Lee Tain Tshung died, the 60% shareholding in the company vested in the DGI by operation of law. As such, the argument that the grant of probate entitled the applicant to become the legal representative of Lee Tain Tshung in respect of the 60% shareholding in the company was not valid. (paras 14-16)

(3) The applicant's action was to review the decision of the Official Receiver in his capacity as a liquidator. Since the action was not against the company, the Official Receiver's objection that leave had not been obtained under s. 226(3) of the Act had no merit. However, the institution of civil proceedings by third parties without prior leave would interfere with the work of court appointed receivers. The applicant omitted to obtain prior leave from the court before joining the first defendant as a defendant. As such, the first defendant ought to be struck out as a defendant in this application. Since the applicant was not a contributory of the company by virtue of s. 216(2), she did not have the *locus standi* to appeal under s. 279 to challenge the decision of the Official Receiver. Even if the appeal was meritorious, no relief could be granted. (paras 18, 20, 22 & 23)

Obiter:

(1) The application could be criticised on the ground that it was an embarrassing pleading because s. 279 of the Act was not cited in the intitulement or the body of the originating summons or the affidavit in support. It was raised for the first time in the written submissions. However, since the defendants did not raise this issue, the court proceeded to consider the merits of the objections raised by them (*Cheow Chew Khoon v. Abdul Johari Abdul Rahman*; refd). (para 6)

Case(s) referred to:
Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***
Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & Ors [1994] 4 CLJ 959 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 8(1), (2), 24(4), 73(1)(a)
Companies Act 1965, ss. 216(2), 226(3), 279

For the plaintiff - Victor Chong; M/s Poh & Victor Chong Advocs
For the 1st defendant - S Vanugopal; M/s S Vanugopal & Partners
For the 2nd defendant - Monica Linsua; Department of Insolvency Malaysia

Reported by Kumitha Abd Majid

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] This is an application by way of originating summons to challenge the decision of the official receiver who was appointed as the liquidator of a company that had been wound up. The decision of the official receiver was made in the course of administering the affairs of the said company. In the

intitulement or the body of the originating summons or the affidavit in support, the applicant did not state under what rule or statute, this court is being moved to grant relief. However, in the written submissions, counsel for applicant stated that the application is grounded upon s. 279 of the Companies Act 1965.

Background Facts

[2] The background facts relate to the business affairs of the late Lee Tain Tshung @ Lee Tain Chiung. He held 60 per cent of the shares in a company known as Tamparuli Granite Quarry (Sabah) Sdn Bhd (In Liquidation) (the "company"). The other 40 per cent of the shares were held by one Sek Ann Thong. On 10 May 1983, the company entered into a sale and purchase agreement with Naslei Enterprise Sdn Bhd (receivers appointed) to buy a property described as "1202 Waikiki Condominiums". The agreed purchase price was RM970,000. The company paid RM304,000 as partial settlement of the purchase price. The applicant who is the executrix and widow of Lee Tain Tshung has averred in the affidavit in support that the director of Naslei Enteprise Sdn Bhd had admitted that a further RM208,886 had been set off against the purchase price because of materials supplied by the company.

[3] I shall now refer to some crucial events that have a bearing on this application. On 19 January 1989, the court appointed receivers to manage Naslei Enterprise Sdn Bhd. On 9 July 1991, the High Court ordered that no action may be maintained against Naslei Enterprise Sdn Bhd (receivers appointed) or the receivers without leave being obtained from the court. Lee Tain Tshung was adjudged a bankrupt on 23 November 2001. He remained an undischarged bankrupt when he died on 14 June 2008. The applicant who is the widow of Lee Tain Tshung obtained a grant of probate on 6 February 2014. Under the last will and testament of Lee Tain Tshung, she was named as the executrix and trustee. The company was wound up on 18 October 2011 pursuant to a winding up petition filed by the Government of Malaysia for failing to pay taxes.

[4] The instant application is related to the condominium property that was purchased by the company in 1983. The complaint of the applicant is that the official receiver had decided not to redeem the said property by paying the balance of the sale and purchase price. She said that she was at all times willing to pay the balance of the purchase price and referred to letters that passed between the parties. She referred to the general meeting of creditors that was scheduled by the official receiver on 6 March 2014 at 10am. She said that she was given notice of the meeting. However, when she presented herself at the meeting of the official receiver, she was barred from attending. On the next day, the representative of the petitioning creditor (Inland Revenue Board) told her that her right to secure the property had

been forfeited. She said that the property has sentimental value for her as her late husband purchased through the company and she intends it to be inherited by her grandchildren. She also said that the official receiver had written to the first defendant on 25 March 2014 to state that he did not intend to redeem the property by proceeding with the sale and purchase agreement due to "insufficient funds". As a result, the initial payment of RM207,000 was forfeited by Naslei Enterprise Sdn Bhd (receivers appointed). The applicant also disputed that only RM207,000 was paid to the first defendant as construction materials had also been supplied earlier to offset against the purchase price. She said that "a real and substantial part of the company's assets" had been given up by the official receiver to the detriment of the contributories. She claims to be an interested party as the executrix of the estate of her late husband. Therefore, her counsel submitted her intention to secure the property should have been considered at the general meeting. She also referred to another unit, ie, MC402 Wikiki Condominium which was purchased by her husband personally. Apparently, she was allowed to complete the sale by paying the redemption sum.

Issues

[5] The reliefs that the applicant seeks in this application are as follows:

> (a) a declaration that the purported termination of the Sale and Agreement dated 10th May 1983 between the 1st Defendant and Tamparuli Granite Quarry (Sabah) Sdn Bhd (Co. No. 64668-H) and forfeiture of the part payment thereunder on 25th June 2014 made by the 1st Defendant are null and void and have no legal effect;
>
> (b) a declaration that the said Sale and Purchase Agreement dated 10th May 1983 between the 1st Defendant and Tamparuli Granite Quarry (Sabah) Sdn Bhd (Co. No. 64668-H) is valid and subsisting.
>
> (c) a direction that the 1st Defendant did conclude the said Sale and Purchase Agreement dated 10th May 1983 between the 1st Defendant and Tamparuli Granite Quarry (Sabah) Sdn Bhd (Co. No 64668-H) with Tamparuli Granite Quarry (Sabah) Sdn Bhd (in liquidation) through the 2nd Defendant and payment of the balance of the purchase price be made from the funds to be made available by the Plaintiff through the 2nd Defendant.

[6] In short, the applicant is applying to reverse the decision of the official receiver in respect of the property and also unwind the consequences of that decision. This is the reason Naslei Enterprise Sdn Bhd (receivers appointed) had been sued as well. I shall firstly observe that the application in question can be criticised on the ground that it is an embarrassing pleading because s. 279 of the Companies Act 1965 was not cited at all in the intitulement or the body of the originating summons or the affidavit in support (see *Cheow Chew Khoon v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 MLJ

457 at p. 477). It was raised for the first time in the written submissions. Nonetheless, as the defendants have not raised this issue, I shall proceed to consider the merit of the preliminary objections raised by them.

[7] Section 279 of the Companies Act 1965 reads as follows:

> 279. Appeal against decision of liquidator
>
> Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[8] The applicant has stated in her affidavit that she is an interested party because she is the executrix of Lee Tain Tshung who held 60 per cent shareholding in the company. During submissions, her counsel submitted that as executrix of the estate of Lee Tain Tshung, she is a contributory of the company.

[9] Counsel for Naslei Enterprise Sdn Bhd (receivers appointed) and the official receiver have raised preliminary objections to this application. I shall first consider the objection of the official receiver.

[10] Counsel for the official receiver has raised two objections. In the affidavit in opposition, the official receiver referred to s. 216(2) of the Companies Act 1965 and submitted that the applicant has no *locus standi*. I am of the opinion that s. 216(2) of the Companies Act 1965 read together with the provisions of the Bankruptcy Act 1967 completely deprives the applicant of any legal standing to complain about the manner the affairs of the company are being administered by the official receiver in his capacity as liquidator. Section 8(1) provides that upon bankruptcy, the estate of the bankrupt is vested in the Director General of Insolvency (DGI). The provision reads as follows:

> (1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

[11] The law that DGI is the receiver of the estate of a bankrupt is restated in ss. 24(4) and 73(1)(a) of the Bankruptcy Act 1967. Section 24(4) reads as follows:

> (4) When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Director General of Insolvency.

[12] Section 73(1) reads as follows:

> (1) As regards the estate of a debtor, the Director General of Insolvency shall-(a) act as the receiver of the debtor's estate, and act as manager thereof where a special manager has not been appointed;

[13] In the instant case, the applicant has complained that she was not allowed to participate in the general meeting of creditors and not allowed to redeem the property in question. The applicant also submitted that the official receiver had improperly and had wrongfully given up the property of the company to the detriment of the creditors and contributories of the said company. However, by virtue of the provisions of the Bankruptcy Act 1967 that I cited above, the entire estate of Lee Tain Tshung vested in the DGI upon making of the adjudication and receiving order on 23 November 2001. This means that the 60 per cent shareholding in the company vested in the DGI. I shall now consider the effect of s. 216(2) of the Companies Act 1965. Section 216(2) reads as follows:

> Contributories in the case of bankruptcy of member
>
> (2) If a contributory becomes bankrupt or assigns his estate for the benefit of his creditors, either before or after he has been placed on the list of contributories:
>
> (a) **his trustee shall represent him for all the purposes of the winding up and shall be a contributory accordingly; and**
>
> (b) there may be proved against his estate the estimated value of his liability to future calls as well as calls already made. (emphasis added)

[14] By virtue of s. 216(2) of the Companies Act 1965, the DGI is the "trustee" of a contributory who has become bankrupt and can represent him for "all purposes of the winding up". Section 216(2) authoritatively pronounces that the trustee "shall be a contributory accordingly". This means that although the applicant is the executrix of the Lee Tain Tshung and has obtained a grant of probate, insofar as the 60 per cent shareholding of Lee Tain Tshung is concerned, the contributory is now the DGI by virtue of s. 216(2) of the Companies Act 1965 and s. 8(1) of the Bankruptcy Act 1967. It is also significant that in the schedule of assets and liabilities annexed to the grant of probate obtained by the applicant, the 60 per cent shareholding of Lee Tain Tshung in the company is not listed. In fact under item 4 which refers to property in private and public companies, the value is stated as "nil". Therefore, the grant of probate itself does not give any right to the applicant to claim that she is a contributory of the company. Counsel for the applicant emphasised that under the Probate and Administration Ordinance of Sabah (Cap 109), the applicant is the legal representative of Lee Tain Tshung. He submitted as follows:

As the lawful representative based on the Grant of Probate of the estate of her late husband who is the contributory of the said company, she has sufficient interest and is clearly entitled to filed the said OS. It is submitted that even without the Grant of Probate, the Plaintiff can be considered as the legal representative for the estate of her late husband.

[15] With respect, the argument that Lee Tain Tshung was a contributory of the company is not tenable. By virtue of s. 216(2) of Companies Act 1965 and the provisions of the Bankruptcy Act 1967, the DGI had become the contributory of the company. In fact, although the Probate and Administration Ordinance of Sabah (Cap 109) provides that the executor or administrator is the legal representative of the deceased "for all purposes", it also provides an important qualification. It provides that property cannot vest in the executor or administrator if it had passed by survivorship to some other person.

3. The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such:

Provided that nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person.

[16] Therefore, the grant of probate does not grant absolute right to the executor to manage the estate of the deceased. In the instant case, even before Lee Tain Tshung died, the 60 per cent shareholding in the company had become vested in the DGI by operation of law. In the premises, the argument that the grant of probate entitles the applicant to become the legal representative of Lee Tain Tshung in respect of the 60 per cent shareholding in company is not valid.

[17] The second objection of the official receiver is that leave had not been obtained under s. 226(3) of the Companies Act 1965. The provision reads as follows:

Actions stayed on winding up order

(3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

[18] In my view, the argument of counsel for applicant that the action is not against the company but against the official receiver has merit. The action of the applicant is under s. 279 to review the decision of the official receiver in his capacity as liquidator. The action is not against the company. In the premises, I see no merit in this objection.

[19] The preliminary objection of the Naslei Enterprise Sdn Bhd (receivers appointed) is that no prior leave had been obtained to maintain this action in accordance with the terms of the order of the High Court on 9 July 1991 which, in part, reads as follows:

> that no action, application or other proceedings shall be commenced continued or maintained against the Respondent and/or the Court appointed Receivers and Managers thereof without first leave of this Court being obtained;

[20] Counsel for Naslei Enterprise Sdn Bhd (receivers appointed) also referred to the general principle that prior leave must be obtained before a court appointed receiver can be sued (*Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & Ors* [1994] 4 CLJ 959; [1995] 1 MLJ 1). Counsel for applicant submitted that if leave is required, an oral application can be made later. He further submitted that before any decision is made on the appeal under s. 279 of the Companies Act 1965, the presence of Naslei Enterprise Sdn Bhd (receivers appointed) is essential for all issues to be determined including the decision of the official receiver not to continue with the purchase of the property in question. In my opinion, the objection of counsel for Naslei Enterprise Sdn Bhd (receivers appointed) has merit because institution of civil proceedings by third parties without prior leave would interfere with the work of court appointed receivers as stated in the authority cited. Therefore, on this ground as well, Naslei Enterprise Sdn Bhd is entitled to be struck out as defendant in the instant application.

Other Issues

[21] Counsel for the official receiver also submitted that the grant of probate dated 6 February 2014 obtained by the plaintiff was improper as the application was not made known to the Director General of Insolvency. I am of the view that it is unnecessary to determine this issue in this proceeding. There is no application under Probate and Administration Ordinance of Sabah (Cap 109) to set aside or challenge the said grant of probate. Counsel for official receiver also submitted that the entire condominium project, including the unit in question was charged to an asset management company called Danaharta Urus Sdn Bhd. She submitted that s. 8(2) of the Bankruptcy Act 1967, gives priority to the secured creditor to realise the charged property. In my view, it is unnecessary to decide on the right of the secured creditor in this application. The application is directed at challenging the decision of official receiver in giving up the property in question. However, I am of the view that since the applicant is not a contributory of the company by virtue of s. 216(2) of the Companies Act 1965, she has no *locus standi* to appeal under s. 279 of the Companies Act 1965 to challenge the decision of official receiver.

Conclusion

[22] In concluding this judgment, I shall observe that the applicant is not merely appealing the decision of the official receiver in respect of the property in question. She is also seeking relief to unwind the consequences of the decision of the official receiver that affects the rights of Naslei Enterprise Sdn Bhd (receivers appointed). However, she omitted to obtain prior leave from the court before joining Naslei Enterprise Sdn Bhd (receivers appointed) as a defendant.

[23] In the premises, even if the appeal was meritorious, no relief can be granted. For all the above reasons, I shall dismiss the application. I order the plaintiff to pay the first defendant and second defendant costs of RM2000 each.